Filed 1/14/09 P. v. Cordova CA2/5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. ROBERTO CARLOS CORDOVA, Defendant and Appellant.	B207220 (Los Angeles County Super. Ct. No. VA102199)

APPEAL from a judgment of the Superior Court of Los Angeles County, Margaret Miller Bernal, Judge. Affirmed.

Linda L. Gordon, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, James William Bilderback II, Supervising Deputy Attorney General, David Zarmi, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

Following a jury trial, defendant and appellant Roberto Cordova (defendant) was convicted of assault with a deadly weapon, a baseball bat. On appeal, defendant argues that the trial court committed prejudicial error when it refused to instruct the jury on self-defense. We hold that the trial court did not err by refusing to instruct on self-defense because the evidence did not warrant such an instruction. We therefore affirm the judgment of conviction.

FACTUAL BACKGROUND

A. Prosecution's Case

On the afternoon of August 21, 2007, Richard Villegas (Villegas) was driving in his white 2002 "Jetta" automobile with his wife when he noticed a 1984 or 1985 "Chevy van" swerving into his lane. Villegas honked his horn to "get this person back [in] the correct lane." He did not make eye contact with the driver of the van and did not have any verbal exchange with him.

At the intersection of Santa Fe and Firestone, Villegas and the driver of the van—whom Villegas identified at trial as defendant—looked at each other. The two vehicles were stopped at a red light. Villegas was in the left lane waiting to make a left turn onto Firestone, and defendant's van was two lanes to his right, with a car between their two vehicles. Villegas observed defendant exit the van with a baseball bat and pass behind the vehicle to the right of Villegas, "walking pretty fast, almost running . . . ." Defendant was holding the bat "up like he [was] going to swing." Defendant ran toward the passenger window of the Jetta, swinging the bat as he ran. Because it appeared defendant was trying to hit the passenger window next to where his wife was sitting, Villegas feared for his wife's safety and "had to jerk the car . . . [to] move the car out of the way." As Villegas moved his car forward, defendant hit the "back windshield" of Villegas's Jetta, completely "shatter[ing] out" the window and making a dent in the window frame.

Villegas considered using the mace he carried with him, but chose not to do so, and he never exited his vehicle. Villegas never approached defendant's van with any kind of a weapon in his hand. Instead, Villegas "took the light," but defendant followed him. Villegas told his wife "this guy is right behind us get on the phone." But his wife was so nervous she could not dial 911. Villegas tried to dial 911 three times, but the line was busy.

Villegas decided to make a u-turn to avoid defendant and "get [defendant's] plates." After Villegas passed defendant going in the opposite direction, defendant turned down a street, put his van in reverse, and maneuvered behind Villegas's Jetta once again. Defendant then crashed into the back of Villegas's Jetta with the front of his van, causing damage to Villegas's rear bumper.

Villegas proceeded to the corner of Firestone and Santa Fe, made a u-turn, and parked across from a gas station because he noticed that defendant's van had stalled and was leaking fluid after the collision. He was waiting to determine if someone would call the police. Defendant restarted his van and Villegas followed him northbound on Santa Fe and then into "another little street in South Gate." When Villegas entered that little street, defendant "ran out of his vehicle with something in his hand that [Villegas] thought [was] a weapon, a gun." As defendant was running toward the Jetta, Villegas's wife screamed "this guy is go[ing] to kill us." Villegas put his Jetta in reverse, and a car behind him moved to allow him to pass.

Villegas turned onto Saturn, observed a policeman speaking to someone else, and told the policeman what had occurred. As the officer "put out a broadcast," defendant's van passed their location. The officer told Villegas, "move your car," and pursued defendant's van. The South Gate police transported Villegas and his wife to a location where defendant had been stopped. Villegas identified defendant for the police as the man who had shattered the rear window of his Jetta and rammed his Jetta from behind.

Marteny Hernandez (Hernandez), Villegas's wife, testified with the aid of a Spanish interpreter and corroborated that on August 21, 2007, she was riding as a passenger in her husband's car when she saw a man "driving oddly." The driver of the

van[1] exited the van at a stop light. The driver came directly to the passenger side of their car where she was sitting. He stood next to her with the bat in the air. The driver swung the bat and Hernandez "thought he was going to hit [her] with the bat and [that she] was going to [be] killed." As the man swung the bat, Hernandez's husband moved their car quickly. The driver of the van broke the rear passenger window[2] of their car.

When Hernandez's husband drove away from the scene, the driver of the van followed them. The driver of the van "came in reverse to go around. He tried to hit [them] once, but [her] husband moved quickly and then [the driver] tried again and he rammed [them] right in the back, the entire back [of their car]." At the end of the incident, Hernandez saw a police officer, and her husband told the officer what had happened. She was taken to a location where she saw the man who had hit their car with a bat and identified him for police.

On August 21, 2007, at approximately 4:30 p.m., South Gate Police Officer David Kochmanski was on duty, assigned to patrol. He observed defendant driving northbound on Long Beach Boulevard at Ardmore. Defendant was driving an older model brown Chevy van. Officer Kochmanski stopped and searched defendant's van and recovered a blue metal baseball bat from behind the driver's seat. The bat did not have white paint on it, but it did appear to have fresh scratches on it. Officer Kochmanski observed his partner, Officer Beditti, recover a plastic "revolver-style" handgun from the glove compartment of the van.

Officer Kochmanski saw Villegas that day, who was driving a white Volkswagen Jetta. Officer Kochmanski concluded that the Jetta had been in a traffic collision because there was "brown paint transfer everywhere that there was traffic collision damage."

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1 Hernandez was unable to identify defendant at trial as the driver of the van, but Villegas was able to identify him.

2 As noted, Villegas testified that defendant broke the "back windshield" of the Jetta. A photograph of the damage to the Jetta's window was introduced into evidence.

When Officer Kochmanski stopped defendant's van, he observed a woman and child inside, in addition to defendant. Officer Kochmanski did not interview the woman or mention her in his arrest report. To his knowledge, no one else interviewed the woman in defendant's van.

B. Defendant's Case[3]

On August 21, 2007, at about 4:30 p.m., defendant was driving southbound on Santa Fe, just south of Broadway, on his way to visit his mother who lived a few blocks from his residence. He noticed a white 2001 Volkswagen Jetta coming up behind him, "passing up traffic." The Jetta passed about five cars, but defendant "didn't think anything weird about it." Defendant was "just driving, minding [his] own business" on a two-lane street that was about to turn into a one-lane street. The driver of the Jetta, Villegas, tried to pass defendant on the left, "kind of like overlapping the lane [from] where the oncoming traffic" was approaching. Because of the parked cars on defendant's right, he could not move out of Villegas's way. Villegas was tailgating defendant's van and "just honking [his horn] the whole time and flipping [defendant] off." Defendant "flipped [Villegas] off as well." He "just flipped [Villegas] off once and from then on . . . ignored him."

At the point where the one-lane portion of Santa Fe returned to two lanes, Villegas pulled up next to defendant's van on the right and followed defendant from Independence to Firestone. Villegas continued to shout obscenities and appeared as if he wanted to fight. Defendant's pregnant wife and two year old daughter were in the van with him. Defendant's wife said, "whatever you do, just keep on going. Try to make a right turn here. Try to like outrun this guy because he looks like he is crazy."

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3 Defendant testified and provided the following facts, which, as can be seen, differ substantially from the description of the August 21, 2007, incident provided by Villegas. Defendant's wife also testified and corroborated some, but not all, of his testimony. She did not, for example, see defendant swing the bat at Villegas's Jetta.

At the intersection of Santa Fe and Firestone, Villegas was in the far left lane, preparing to make a left turn. Defendant was in the far right lane, with a lane between his van and Villegas's Jetta. Defendant intended to proceed straight through the intersection and on to his mother's house. Instead of making a left turn, Villegas went straight through the intersection, "kind of recklessly," and started following defendant. Defendant believed that because he drove a van, he could not outrun the Jetta, so he decided to make a u-turn on Glenwood. Defendant timed the turn so that the oncoming traffic "would kind of stop [Villegas] from following him." Defendant then attempted to turn right on Willow, but there were "some cars stalled right there, so . . . [he] immediately reversed out of there," avoided hitting the Jetta, and proceeded northbound on Santa Fe.

Defendant noticed Villegas was still following him northbound on Santa Fe, so he made a right turn into a gas station. When Villegas followed him into the gas station, defendant made a u-turn, came out of the driveway, and proceeded south on Santa Fe once again. Defendant "gained some distance from [the Jetta] but [it] just kept on coming up toward [defendant's van]." As defendant proceeded southbound, he "made a u-turn once again, on Glenwood." As he drove northbound, the Jetta was headed in the opposite direction. "All of a sudden," the Jetta cut across in front of defendant's van and executed a "fishtail" maneuver. Defendant saw that he was about to impact the passenger side of the Jetta, so he turned his steering wheel to the left and impacted the rear bumper of the Jetta on the passenger side.

At impact, defendant's car stalled and he noticed Villegas reaching for something. It appeared Villegas was exiting his vehicle. He was in fear for the lives of his daughter and pregnant wife, as well as for his own life. He told his wife to remove their daughter from the carseat, exit the side door of the van, and "head for safety." Neither defendant nor his wife had a cell phone on which to call the police.

Defendant then jumped out of his van with a baseball bat. Defendant decided to exit his van with the bat because his van had stalled, no one was helping him, Villegas was still engaging him, and now had something "black" in his hand. When defendant

broke the Jetta's window with the bat, he was not aiming at anyone. He reacted the way he did because of concern for his safety and that of his family. Defendant did not intend to hurt anyone and intentionally aimed at the back window of the Jetta. After defendant broke the Jetta's window, Villegas ducked, entered his vehicle, and drove away.

Defendant noticed his van was leaking radiator fluid, but assumed he could restart the engine. After restarting the van, defendant pulled to the curb and told his wife not to go to his mother's house, but to instead come back to the van.

PROCEDURAL BACKGROUND

In an information, the Los Angeles County District Attorney charged defendant in Count 1 with assault with a deadly weapon (a baseball bat) on Hernandez in violation of Penal Code section 245, subdivision (a)(1)[4]—a felony; in Count 2 with assault with a deadly weapon (an automobile) on Villegas in violation of section 245, subdivision (a)(1)—a felony; in Count 3 with assault with a deadly weapon (an automobile) on Hernandez in violation of section 245, subdivision (a)(1)—a felony; and in Count 4 with possession of a deadly weapon in violation of section 12020, subdivision (a)(1)—a felony. Prior to trial, the trial court dismissed Count 4.

Defendant pleaded not guilty and the matter proceeded to a jury trial. The jury returned a verdict of guilty on Count 1, but could not reach verdicts on Counts 2 and 3, which were thereafter dismissed on the prosecutor's motion pursuant to section 1385.

At the sentencing hearing, the trial court denied probation and sentenced defendant on Count 1 to the low term of two years. Defendant was awarded 308 days of custody credit, comprised of 206 days of actual custody credit and 102 days of conduct credit.

Defendant filed a timely appeal from the judgment of conviction.

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[4] All further statutory references are to the Penal Code unless otherwise stated.

DISCUSSION

A. Standard of Review

Defendant's claim of instructional error is analyzed under a de novo standard of review. "An appellate court applies the independent or de novo standard of review to the failure by a trial court to instruct . . . . Whether or not to give any particular instruction in any particular case entails the resolution of a mixed question of law and fact that, we believe, is however predominantly legal. As such, it should be examined without deference." (*People v. Waidla* (2000) 22 Cal.4th 690, 733.)

B. Claim of Instructional Error

1. Background

Prior to argument to the jury, defendant's counsel requested that the trial court instruct the jury on self-defense, prompting the following colloquy between the trial court and counsel for the parties. "[The Court]: For the record, all jurors have now exited the room. Is there something we need to bring up? [¶] [Defense Counsel]: I was going to be asking for a self-defense instruction and I let counsel know that. I think based on my client's testimony, as well as his wife's testimony, there seems to be a self-defense argument with regard to his efforts to get away from Villegas, the following of Villegas, the getting out of his car. Villegas getting out of his car with what my client believed was some instrument that he was going to use against him which prompted some of his conduct and created in his mind a feeling that he needed to protect not only himself, but his family that was in the car with him. [¶] [The Court]: Okay. So, that would go as to your argument for self-defense, would go only as to the assault with a baseball bat; is that correct? [¶] [Defense Counsel]: Yes. The other statement he has testified that he didn't hit him. [¶] [Prosecutor]: Right. But the problem was the baseball bat, he didn't assault anybody with a baseball bat. He intentionally avoided hitting the window where the woman was and hit the back window. [¶] So, no assault on anybody. No crime. [¶]

[Defense Counsel]: But I think he is charged with assault with a bat as to the female victim. [¶] [Prosecutor]: Right. But the defendant's position is he never tried to hit the front window. He hit the back window. Car never moved. He intentionally hit the back window. He wasn't trying to hit anybody. [¶] So, it is not a reasonable or an honest belief. [¶] [The Court]: So, [P]eople's argument—[P]eople will not object to defense argument that if they believe that he intentionally hit the back window, but did not intentionally go for the front window, that is not the assault? [¶] [Prosecutor]: Oh, correct. I will tell them that. If you believe defendant, he is not guilty on all counts. [¶] [The Court]: Regardless of that part, stick with just assault- - [¶] [Prosecutor]: Sure. [¶] [The Court]: With the baseball bat. [¶] [Prosecutor]: Right. No. There is no assault. [¶] [The Court]: With that, I would agree with the prosecutor, that there is no self-defense instruction with the understanding that the defendant's version is not a self-defense one, but that he hit the back window and not the front window. [¶] And that would not constitute an assault on [Hernandez]."

During his summation, the prosecutor argued that there were two conflicting versions of the events relating to the baseball bat, and that only one of them could be true. "Let's talk about the bat. [Defendant] says, or Villegas says, [defendant] is out of car and swung the bat. Versus what [defendant] says, which is Villegas caused the collision and then [defendant] swung the bat. [¶] So, we have to first decide which story makes sense because one of them is wrong. One of them we are being told is untrue. No way around it."

As he did during the discussion of the requested self-defense instruction, the prosecutor also conceded during argument to the jury that if the jury accepted defendant's version of the incident with the baseball bat, defendant could not be guilty of an assault on Hernandez. "In this case, if you find the defendant as he testified . . . was only hitting the rear window where nobody was seated, that is not an assault. That would not be an assault. [¶] He has to have been aiming at the front window . . . . The result being he will hit the back window. Then that would make it an assault. [¶] You don't have to intend to use any type of force. It is the mere action of what you are doing. And, like I

said, in this case, you have to find he intended to hit the passenger window. There was an intervening act. The car moved forward and he hit the back window. [¶] If you decide he intended to hit the back window, it would not be an assault. [¶] . . . [¶] Now, the interesting thing about this whole case, about what counsel is saying is if you believe everything [defendant] says, you find him not guilty. That is clear. That is not the question. [¶] . . . [¶] And in this case, because the acts are completely opposite, either the window got smashed and a collision, therefore, Villegas [is] telling the truth. [¶] Or there was a collision and the window got smashed, therefore, the defendant is telling the truth. Somebody, you have to cut out of the pack. Somebody you have to say is not tell[ing] the truth."

Following argument, the jury deliberated and reported to the trial court that it had reached a verdict on Count 1—assault with the baseball bat on Hernandez—but that it was unable to reach verdicts on Counts 2 and 3—assault with defendant's van on Villegas and Hernandez. The trial court took the guilty verdict on Count 1 and, on the prosecution's motion, dismissed Counts 2 and 3.

2. Refusal to Instruct on Self-Defense Proper

Defendant contends that the trial court had a sua sponte duty to deliver self-defense instructions because there was substantial evidence that supported such a defense. According to defendant, the trial court refused to instruct on self-defense based on the faulty premise that assault is a specific intent crime, not a general intent crime, requiring proof of an intent to assault a specific victim. In the alternative, defendant contends that the trial court should have instructed the jury on self-defense based on his request for such an instruction because the issue of self-defense was raised by the evidence.

"'"It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are

necessary for the jury's understanding of the case." (*People v. St. Martin* (1970) 1 Cal.3d 524, 531 [83 Cal.Rptr. 166, 463 P.2d 390].)'" (*People v. Breverman* (1998) 19 Cal.4th 142, 154.)

"[T]he sua sponte duty to instruct on all material issues presented by the evidence extends to *defenses* as well as to lesser included *offenses* . . . . In the case of *defenses*, . . . a sua sponte instructional duty arises 'only if it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense *and* the defense is not inconsistent with the defendant's theory of the case.' [Citation.]" (*People v. Breverman*, *supra*, 19 Cal.4th at p. 157.)

In the instant case, the prosecutor argued that two conflicting factual scenarios had been presented to the jury, only one of which could be true. The prosecutor also conceded that if the jury accepted defendant's version of the facts relating to the baseball bat incident, no assault on Hernandez occurred. Based on that concession, which the prosecutor repeated to the jury during argument, the trial court ruled that there was no need for a self-defense instruction. We agree.

Contrary to defendant's contention, neither the trial court nor the prosecutor relied on the premise that assault is a specific intent crime and, therefore, that defendant must have intended to assault Hernandez.[5] Instead, the prosecutor argued that under the People's theory of the case, defendant must have intended a particular act, i.e., swinging the bat at the passenger window of the Jetta near where Hernandez was sitting. Therefore, according to the prosecutor, if, as defendant testified, he did not intend to

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[5] It is undisputed that assault with a deadly weapon is a general intent crime. (*People v. Colantuono* (1994) 7 Cal.4th 206, 213-214.) "'We conclude that the criminal intent which is required for assault with a deadly weapon . . . is the general intent to wilfully commit an act the direct, natural and probable consequences of which if successfully completed would be the injury to another. Given that intent it is immaterial whether or not the defendant intended to violate the law or knew that his conduct was unlawful. The intent to cause any particular injury [citation], to severely injure another, or to injure in the sense of inflicting bodily harm is not necessary.'" (*Id*. at p. 214, quoting *People v. Rocha* (1971) 3 Cal.3d 893, 899.)

commit that particular act, but rather intended only to swing at the back window of the Jetta, defendant did not commit the assault on Hernandez as charged. As the prosecutor viewed the evidence, if the jury believed defendant, his reason for swinging at the back window, i.e., to defend his family, was irrelevant. The gist of defendant's defense to the baseball bat assault charge, from the prosecutor's perspective, was that defendant did not commit the required predicate act, regardless of his state of mind.

Based on the testimony of the percipient witnesses, the trial court correctly concluded that the requested self-defense instruction was not necessary for the jury's understanding of the case because defendant's theory of the case was that he did not swing the bat at the passenger window. As a result, the trial court was under no duty, sua sponte or otherwise, to deliver instructions on self-defense, particularly in light of the prosecutor's concession that if the jury believed defendant intended to swing the bat at the back window of the Jetta, as opposed to the passenger window, defendant was not guilty of an assault on Hernandez. "The trial court's duty in a criminal case to instruct on the general principles of law relevant to the issues raised by the evidence (see *People v. Hood* (1969) 1 Cal.3d 444, 449 [82 Cal.Rptr. 618, 462 P.2d 370]; *People v. Wilson* (1967) 66 Cal.2d 749, 759 [59 Cal.Rptr. 156, 427 P.2d 820]) includes a correlative duty to refrain from instructing on principles of law which not only are irrelevant to the issues raised by the evidence but also have the effect of confusing the jury or relieving it from making findings on relevant issues. (See, for example, *People v. Ireland* (1969) 70 Cal.2d 522, 539, fn. 13 [75 Cal.Rptr. 188, 450 P.2d 580] and accompanying text.)" (*People v. Satchell* (1971) 6 Cal.3d 28, 33, fn.10.) Given the evidence, the trial court properly refrained from instructing on self-defense, as that issue was irrelevant and instructions relating to it could have confused the jury.

DISPOSITION

The judgment of conviction is affirmed.

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MOSK, J.

We concur:

ARMSTRONG, Acting P. J.

KRIEGLER, J.